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NO. _____

Supreme Court, U.S.
FILED
MAR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

E.B.,

Petitioner

versus

BURLINGTON COUNTY WELFARE AGENCY,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a State's refusal to extend Medicaid benefits to someone whose assets were seized unlawfully and without their approval leaving them insolvent, is consistent with 42 U.S.C. 1396(a)(17).

2. Whether a State may, consistent with the Equal Protection Clause of the 14th Amendment to the United States Constitution, deny or refuse to extend Medicaid benefits to someone whose assets were seized unlawfully and without their approval leaving them insolvent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. _____

E.B.,

Petitioner

v.

BURLINGTON COUNTY WELFARE AGENCY,

Respondent

Petition for a Writ of Certiorari
to the Supreme Court of New Jersey

_____

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, E.B., hereby petitions for a Writ of Certiorari to review the

decisions of the Supreme Court of the State of New Jersey and the Appellate Division of the Superior Court of New Jersey denying Medicaid benefits to someone whose assets were seized unlawfully and without their approval leaving them insolvent.

OPINIONS BELOW

The written but unpublished Opinion of the Appellate Division of the Superior Court of New Jersey is appended hereto in the Appendix. In addition, please find attached the written Opinions of the Administrative Law Judge of New Jersey, the Opinions of the Director of the New Jersey Division of Public Welfare, as well as the New Jersey Supreme Court's denial of Petition for Certification.

JURISDICTION

The Order sought to be reviewed was made and entered by Audrey Harris, Director of the New Jersey Division of Public Wel-

fare, on April 26, 1985. A timely appeal was made to the New Jersey Superior Court, Appellate Division, as well as the New Jersey Supreme Court. However, the New Jersey Appellate Division of Superior Court of New Jersey affirmed the above decision. The New Jersey Supreme Court denied the Petition for Certification. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a State's refusal to extend Medicaid benefits to someone whose assets were seized unlawfully and without their approval leaving them insolvent, is consistent with 42 U.S.C. 1396(a)(17).

2. Whether a State may, consistent with the Equal Protection Clause of the 14th Amendment to the United States Constitution, deny or refuse to extend Medicaid

benefits to someone whose assets were seized unlawfully and without their approval leaving them insolvent.

CONSTITUTIONAL AND CONGRESSIONAL PROVISIONS INVOLVED

Amendment XIV, United States Constitution, Section 1: "...nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. 1396(a)(17): "A state plan for medical assistance must - ...(17) include reasonable standards ... for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with the standards prescribed by the secretary, available to the applicant or recipient...."

STATEMENT OF THE CASE

This case involves the denial of Medicaid benefits to a mother who is in a nursing home because of her daughter's refusal to liquidate a mortgage. The daughter had unlawfully taken the mortgage from her mother and is now refusing to liquidate it.

Back in July of 1976, both E.B. (Petitioner) and her husband, left their home in Southampton, New Jersey to live with their daughter because of their bad health.

In the meantime, the property which they had vacated became vandalized. Finally, after many years of trying to find a purchaser, an Agreement of Sale was executed for this property on February 1, 1981. Settlement did not take place, however, until 1983.

On April 1, 1983, a Deed was given to the purchaser signed by the Petitioner's daughter as "attorney-in-fact for" the

mother. This Note and Mortgage were to be paid based on a 20 year payment schedule beginning on April 1, 1986, but with the final payment of the balance due on April 1, 1996.

Although the above Deed was transferred by the Petitioner's daughter as attorney-in-fact for the Petitioner; nevertheless, the mortgage described the daughter as the "payee" and does not describe her as the "attorney-in-fact."

In summary, although the daughter may have sold her mother's property pursuant to a power of attorney, nevertheless, she unlawfully, without her mother's consent, obtained this mortgage. In fact, the Appellate Division of the Superior Court of New Jersey acknowledged this fact in its opinion noting that the daughter had put the mortgage in her own name, although having conveyed the property as attorney-in-fact.

On June 13, 1984, E.B. applied for Medicaid Only benefits. Subsequent thereto, Medicaid benefits were denied because the State of New Jersey considered the mortgage a resource which was available to E.B. and which should have been liquidated.

The daughter, however, refused to liquidate the mortgage. The Welfare Board, as well as the Director for the Division of Public Welfare of New Jersey, therefore concluded that because the daughter acted as the mother's agent in selling the property, that she, therefore, acted as the agent with regard to this mortgage. Consequently, the daughter's failure to liquidate the mortgage is, according to New Jersey, attributable to the mother.

A fair hearing was then held to determine the Petitioner's eligibility for Medicaid. The Administrative Law Judge

in a fair hearing held in favor of the mother stating that the mortgage was not available to her.

The Director of the New Jersey Division of Public Welfare reversed the Administrative Law Judge's initial decision. The Director's decision was affirmed by the New Jersey Superior Court, Appellate Division.

Petitioner then sought certification from the New Jersey Supreme Court on the basis that the State's refusal to extend Medicaid benefits to the Petitioner was in violation or abridgment of her rights under the New Jersey Administrative Code, Congressional Statute, 42 U.S.C. 1396(a)(17), and the Equal Protection Clause of the 14th Amendment of the United States Constitution. The New Jersey Supreme Court, however, denied the Petition for Certification on December 23, 1985.

Neither the Appellate Division of the Superior Court of New Jersey nor the New Jersey Supreme Court adequately addressed the substantial and important questions raised in this case. Rather, they relied on form over substance in concluding that since the daughter was at one time the mother's agent in transferring the real estate, that, therefore, the daughter's refusal to liquidate the mortgage is attributable to the mother.

There are substantial questions in this case which could potentially affect hundreds of thousands of people in this country. According to recent statistics, 22 million people received Medicaid benefits in 1980, although over 28 million people may have been eligible. See Congressional Budget, U.S. Congress, Medicaid: Choices for 1982 and Beyond, 29 (1981).

More importantly, a large percentage of the Medicaid benefits go to recipients

who reside in nursing homes. According to one Congressional Budget Office estimate, over 40% of all Medicaid expenditures are paid for services in nursing homes. CBO Medicaid Analysis, supra. at 9. In addition, nearly 75% of Medicaid expenditures have gone for institutional services, principally in-patient hospital and nursing services. See CBO, at 104.

Accordingly, the decision in this case could have the potential of a far reaching affect on those people who are currently in nursing homes and who are applying for Medicaid benefits. The questions involve whether or not property unlawfully acquired by another party should still be considered in determining that applicant's eligibility for Medicaid. Although there are no statistical accounts, nevertheless, it would seem as though most of the residents in a nursing home have relatives who have either acquired their property with their consent;

or, in the alternative, have abused and used them in acquiring their property without their consent.

There are serious questions as to the interpretation and the applicability of Federal and Constitutional Law which deserves the review of the United States Supreme Court.

The Appellate Division of the Superior Court of New Jersey did not address the substantial and important questions raised in this Petition for Certiorari. Rather, they relied on form over substance in concluding that since the daughter was at one time the mother's agent in transferring the real estate, that, therefore, the daughter's refusal to liquidate the mortgage is attributable to the mother.

The New Jersey Courts failed to address the broad policy issues involved. Did Congress intend by passing the Medicaid legislation to force indigent appli-

cants for Medicaid to file suits in the State Courts in order to retrieve their property which may have at one time belonged to them? Should Medicaid be denied to someone whose assets were unlawfully taken away from them without their consent?

The Courts in New Jersey in effect are telling the Petitioner that although she is poor enough and financially needy enough to gain admission to the Medicaid program, nevertheless, she will not be entitled to receive the benefits as her daughter violated her trust and obtained her property unlawfully and without her consent. The Courts then assert a legal fiction that she is to regain possession of this property by going to the Superior Court and filing suit against her daughter. The Court does not indicate how she is to fund this litigation. While the litigation is pending, she will not be receiving any Medicaid benefits. This is cer-

tainly not what the State Legislature or what Congress intended through the passage of the Medicaid program.

POINT I

Whether a State's Refusal to Extend Medicaid Benefits to Someone whose Assets were Seized Unlawfully and Without their Approval Leaving them Insolvent is Consistent with 42 U.S.C. 1396(a)(17).

New Jersey participates in the Federal Medicaid program which is intended to provice public funds to persons otherwise without sufficient resources to aid them in obtaining medical assistance.

Participation in the Medicaid program is voluntary, but for a State to receive Federal funds, its approved plan must meet all the requirements of the Federal Statute, 42 U.S.C. 1396(a), and implementing regulations. See Beal v. Doe, 432 US 438, 444 (1977).

Since New Jersey participates in the Medicaid program, it must implement a Federally approved plan for medical assistance

as mandated under the above Federal Statute.

According to 42 U.S.C. 1396(a)(17), only those resources which are "available" to an applicant can be considered in determining that applicant's eligibility for Medicaid.

In the case at bar, the State of New Jersey's interpretation and application of its regulations which denied benefits on the basis of the daughter's refusal to liquidate the mortgage is inconsistent with the above Federal Statute.

In construing the language of the Federal Statute and its supplementary rules and regulations, the Court should recognize the remedial nature of the legislation and, accordingly, construe its terms liberally. Consequently, we do not believe that the denial of Medicaid benefits in this case is in accord with the purpose of the Medicaid program.

Congress did not intend to deny Medicaid benefits to a person whose assets were unlawfully and without their consent taken from them. Therefore, New Jersey's interpretation of the Administrative Code in this case is inconsistent with the Federal Statute.

POINT II

Whether a State may, Consistent with the Equal Protection Clause of the 14th Amendment to the United States Constitution, Deny or Refuse to Extend Medicaid Benefits to Someone whose Assets were Seized Unlawfully and Without their Approval Leaving them Insolvent.

The 14th Amendment of the United States Constitution commands that no person shall be denied equal protection of the law by any State. The Equal Protection Clause guarantees that similar individuals will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same.

The Petitioner in this case is "assetless" because of her daughter's unlawful

taking of her property. Should this mother be treated the same as an applicant who is the beneficiary of a trust account and refuses to obtain the benefits? See William H. Stoudt v. Commonwealth of Pennsylvania, Department of Public Welfare, 464 A.2d 665 (Pa. Commonwealth 1983). Should this applicant be treated differently than someone who has always been "asset-less" all of his life?

Petitioner acknowledges that the "rational relationship test" is applicable to this matter rather than the strict scrutiny test. See Beal v. Doe, supra.; see also Dandridge v. Williams, 397 US 471 (1970) (although the Court did note that the administration of public welfare assistance involves one of the most basic economic needs of impoverished human beings).

The classification as applied in this case does not comply with the traditional equal protection criteria referred to above. The classification is not rational-

ly ralated to the purpose of the Medicaid program.

Congress enacted Medicaid legislation "for the purpose of enabling each state... to furnish medical assistance on behalf of families...whose income and resources are insufficient to meet the cost of necessary medical services...." 42 U.S.C. 1396.

As noted previously, in construing the language of the Statute, the Court should recognize the remedial nature of the legislation, and accordingly, construe its terms liberally.

In light of the above purpose of the Medicaid program, the classification made by New Jersey is not rationally related and will not further the purpose of this legislation. Everyone in this case admits that the Petitioner, without the mortgage, is eligible for Medicaid. She does not have sufficient income to care for herself. It is not her fault that her daughter has

taken her mortgage away from her. She should not be denied Medicaid benefits and it is not a proper classification in light of the purpose of the Medicaid program to deny her benefits. The classification simply does not fulfill any desired purpose of the State and in administering the Medicaid program.

The only plausable purpose this classification might have is to avoid fraud; i.e., that a potential applicant could transfer funds and assets to a relative in order to obtain admission into the Medicaid program. However, Petitioner respectfully submits that this is not a persuasive argument.

In one case involving a Federal Welfare type program, this Court dismissed the State's argument that the classification was rationally related to the interest in minimizing fraud. In the case of U.S. Department of Agriculture v. Moreno, 413 US 528 (1973), Justice Brennan pointed to

other statutory provisions on fraud as casting "considerable doubt" on the argument that the classification could rationally have been intended to prevent fraud.

There is a clear and applicable provision of the New Jersey Administrative Code which addresses itself to the question of minimizing fraud. N.J.A.C. 10:94-4.7 provides that if an asset is transferred by an applicant for Medicaid for less than fair market value within 24 months preceding the date of application, then there is a rebutable presumption that said asset or resource was transferred in order to qualify for Medicaid.

In the case at bar, if the State of New Jersey feels that the mortgage was transferred by the mother to the daughter in order to gain admission to Medicaid, then they have the right to proceed with a hearing to determine this issue. However,

rather than proceeding with such a hearing, New Jersey has arbitrarily concluded that the mortgage is available to the mother.

In summary, the refusal to extend Medicaid benefits to the Petitioner is the denial of her rights under the Equal Protection Clause. The classification does not rationally relate to the purpose of the Medicaid program.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests this Court to grant Certiorari.

Respectfully submitted,

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APPENDIX

E.B.,	:	SUPREME COURT OF
	:	NEW JERSEY
Petitioner-Petitioner	:	
	:	C-368
	:	
vs.	:	SEPTEMBER TERM, 1985
	:	
	:	24,702
BURLINGTON COUNTY	:	
WELFARE AGENCY,	:	
	:	ON PETITION FOR
Respondent-Respondent	:	CERTIFICATION

To The Appellate Division, Superior Court:

A petition for certification of the judgment in A-4081-84T5 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 23rd day of December, 1985.

STEPHEN W. TOWNSEND
Clerk of the Supreme
Court of New Jersey

RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4081-84T5

BURLINGTON COUNTY WELFARE AGENCY,
Petitioner-Respondent.

v.

E.B.,
Respondent-Appellant,

Argued: September 19, 1985 - Decided:

Before Judges Petrella and Ashbey.

On appeal from Department of Human Services, Division of Public Welfare.

Donald B. Mark argued the cause for appellant (Slater & Tenaglia, P.A., attorneys).

Dorothy Donnelly, Deputy Attorney General, argued the cause for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel).

PER CURIAM

The Burlington County Welfare Board (Welfare Board) disallowed "Medicaid Only"

benefits to appellant E.B. because neither she nor her daughter, R.A., liquidated a certain note and mortgage which represented the proceeds of sale of E.B.'s house. After E.B. appealed, a fair hearing was held before an Administrative Law Judge (ALJ) who recommended reinstatement of benefits. The Director of the Division of Public Welfare (Director) reversed the ALJ's initial decision and upheld the termination of benefits. E.B. now appeals. The issue is whether the refusal of E.B.'s daughter to liquidate the mortgage, which the daughter had put in her own name after the daughter conveyed the property as "attorney-in-fact," disqualified E.B. from welfare benefits.

There are references in the record to E.B. being senile or perhaps incompetent. However, no guardianship or conservatorship proceedings had been undertaken. E.B.'s attorney represents her on this appeal of the Medicaid Only eligibility disqualification, and he advised us at oral argument

that he also represents her daughter R.A. who is not a party hereto. See RPC 1.7.

The facts developed before the ALJ at the "Fair Hearing" were that E.B. and her husband, R.B. (now deceased), had resided in a house in South Hampton Township, New Jersey until they went to live with thier daughter, R.A., in July 1976. The South Hampton house became run down and was subjected to trespassers and vandalism.

R.A. testified[1] that shortly thereafter R.B. verbally gave the property in South Hampton Township to her as the only child and heir, stating that they (her parents) would never be able to go back there. R.A. said she felt the property was hers because of what her father told her. However, at no time was a deed ever transferred between R.A. and her parents.

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1 E.B. did not appear at the March 25, 1985 hearing before the ALJ, but was represented by an attorney and her daughter who described E.B. as having been somewhat senile. R.A. said that she and her father had been having problems with E.B.

On February 1, 1981 R.A. entered into a sales agreement with Mr. and Mrs. Horn for the sale of her parent's property. She purported to act as "attorney-in-fact" for her parents. In her testimony she said she acted pursuant to a power of attorney executed by her parents. However, the only power of attorney produced was a written power of attorney to R.A. from her father, R.B., dated November 1, 1981 which is nine months after the contract date. That power of attorney specifically authorized sale of the South Hampton property "for me and in my name...."

It was not until April 1, 1983 that a deed was given to the Horns signed by R.A. "as attorney-in-fact for" R.B. and E.B. for $50,000, payable $1,000 down and the balance of the purchase price secured by an April 1, 1983 note and mortgage. The note and mortgage were to be paid based on a 20-year payment schedule beginning on

April 1, 1986, but with the final payment of the balance due on April 1, 1996. The mortgage note contained the following additional provision concerning payments:

> From the date of this Note until March 1, 1986, interest does not accrue on the borrowed amount, except that the Borrower shall pay the sum of Two Hundred Dollars ($200.00) per month on the first day of each month starting April 1, 1983 and ending March 1, 1986. The first five (5) monthly payments (totaling $1,000.00) are to be made when this Note is signed. The payments of $200.00 per month will not be credited against principal. Regular monthly payments of $550.55 will be due beginning April 1, 1986. These payments will be credited first against interest and then against principal.

R.A. testified that she held her mother's power of attorney, although no document was produced evidencing such status.[2] Nevertheless, the ALJ apparently accepted that tes-

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2 There is no written power of attorney in the record from E.B. to R.A. and counsel, who says he represents both E.B. and R.A., has no knowledge of any such written power of attorney.

timony. Neither the note nor the mortgage contain any reference or recital that R.A. acted as attorney-in-fact for her parents. Rather, R.A. is named as the holder of both the note and mortgage and claimed to own the mortgage. R.A. admitted before the ALJ that she was acting as agent for her mother in 1983, and specifically at the time the mortgage was made. She also said that the $1,000 paid when the note was signed went to the nursing home where her mother was living at the time.

On June 13, 1984 R.A. applied for Medicaid Only benefits for her parents, and she listed on the application form interest income of $200 per month to her parents from the mortgage. Although the welfare agency extended benefits, it investigated the mortgage as a possible resource which could be subject to liquidation.

R.A. placed her parents in a nursing home in Marlton, New Jersey on July 16,

1984, and then telephoned the Welfare Board to advise it of that fact. She was then told that the proceeds of the sale of her parent's property would be considered as their income. Apparently two days later her father had a stroke in the nursing home. He died on August 3, 1984.

The welfare Board notified R.A. on October 5, 1984 that under the Medicaid Only eligibility requirements the mortgage had to be liquidated because it was considered a resource of E.B. under agency regulations, thus making her ineligible for further benefits. On February 14, 1985 E.B. was notified that under N.J.A.C. 10:94-4.3(b) benefits were terminated because she was considered to have liquid resources which made her ineligible for assistance.

The ALJ found that E.B. and R.B. had been the owners of the South Hampton property which had been their marital resi-

dence. He erroneously found[3] that R.B. executed a power of attorney on February 1, 1981 in favor of R.A. when that document was actually executed on November 1, 1981. The ALJ accepted R.A.'s testimony that she had her mother's power of attorney and found that R.A. conveyed the property on April 1, 1983 on behalf of her mother and father. According to the ALJ, E.B. never revoked the power of attorney given to R.A. and was currently incompetent to do so. We note parenthetically that absent a document[4] evidencing a power of attorney, there would be no indication that any power of attorney would remain

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3 The only document in the record that had been executed on February 1, 1981 was the contract of sale executed by R.A. as "attorney-in-fact."

4 Generally such a power-of-attorney to convey land must be in writing and recorded. See N.J.S.A. 46:2A-5(d) and 46:6-3; see also Powers v. Lore, 9 N.J. Super. 549 (Ch. Div. 1950); Tyrrell v. O'Connor, 56 N.J.Eq. 448 (E. & A. 1897).

viable in the event of the senility or incompetency of the grantor of the power. See N.J.S.A. 46:2B-8.

The ALJ concluded that although the mortgage documents represented the proceeds from the sale of the property, the mortgage was not "available" to E.B. because her daughter refused to liquidate it. He reasoned that he was powerless to affect ownership of the mortgage, and the alleged senility[5] of E.B. deprived her of the ability to force her daughter, R.A., to liquidate the mortgage or even to revoke the power of attorney.

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5 Unless a power of attorney was executed in accordance with the statutory provision regarding incompetency or disability not revoking the power, N.J.S.A. 46:2B-8, 46:2B-9, ordinarily the disability of the grantor would revoke the power of attorney unless it was a "power coupled with an interest." Sarokhan v. Fair Lawn-Mem. Hosp., Inc., 83 N.J. Super. 127, 135 (App. Div. 1964); Maihack v. Mehl, 141 N.J.Eq. 281, 287 (Ch. 1948).

The Director rejected the ALJ's initial decision and concluded that the mortgage was a resource "available" to E.B. through the power of attorney held by her daughter.[6] The Director found that there was no competent evidence in the record supporting a finding of senility or incompetence by E.B., and that the mortgage remained available to her. The Director took the position that: "In the absence of an adjudication by a court having jurisdiction over the matter, it must be presumed that...[E.B.] has the legal capacity to revoke the power of attorney given." The Director concluded that under the law of agency, R.A.'s refusal to liquidate the resource could be imputed to E.B., and hence her benefits were properly terminated for failure to cooperate in liquidating the mortgage.

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6 She also seemed to accept the existence of some power of attorney from E.B. to R.A.

E.B. contends that the Director erred in finding that the mortgage was a resource available to her which was required to be liquidated by her agent, R.A. She argues that the mortgage should not be considered in determining Medicaid Only eligibility because it is neither a resource pursuant to N.J.A.C. 10:94-4.1(b), nor available to her pursuant to subsection (c) thereof. She also argues that it is an excludable resource because it is inaccessible within the meaning of N.J.A.C. 10:94-4.4(b)(6). The brief submitted on behalf of E.B. contends that the mortgage is not owned by nor available to her and is an excludable resource.

The Director points out that ownership of a mortgage need not be legal ownership. It is sufficient that E.B. has a resource which is traceable to property in which legal title was held. The Director argues that there is sufficient basis in the

record to support her decision that the mortgage is a resource which is available to E.B. through her agent.

New Jersey participates in the federal Medicaid program which is intended to provide public funds to persons otherwise without sufficient resources to aid them in obtaining medical assistance. Hedgebeth v. Medford, 74 N.J. 360, 364 (1977). Medicaid Only assistance is provided to eligible persons as provided in N.J.S.A. 30:4D-3(i) in accordance with the federal Medicaid program. See 42 U.S.C. Sec. 1396, et seq. In computing an applicant's resources to determine Medicaid eligibility, only income and resources "available" to the applicant are taken into account in accordance with standards prescribed by the federal authorities. 42 U.S.C. Sec. 1396a (a)(17)(B).

N.J.A.C. 10:94-4.1(b) defines resource as: "any real or personal property" which is "owned" by an applicant. A resource

must also be "available" to an applicant. Available means having "the right, authority or power to liquidate real or personal property or his/her share of it...." N.J.A.C. 10:94-4.1(c)(1). Available resources in excess of $1,500 must be liquidated,[7] and until such time as the value of the applicant's resources falls within that limit, benefits are terminated. N.J.A.C. 10:94-4.5(d); N.J.A.C. 10:94-4.3(d).

E.B. argues that the ALJ and the Director failed to make a finding of ownership of the mortgage. She emphasizes that the ALJ ruled that the mortgage was not available, and therefore,

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7 Such available resources must be disposed of within six months if real property and three months if personal property. N.J.A.C. 10:94-4.3(b). A refusal to cooperate in developing a plan to liquidate available assets results in the termination of benefits. N.J.A.C. 10:94-4.3(f).

not required to be liquidated. However, we review the findings and decision of the agency head, not that of the ALJ. See Dore v. Bedminster Twp. Bd. of Ed., 185 N.J. Super. 447, 452 (App. Div. 1982).

As final administrative arbiter of welfare matters, the Director is not limited to reviewing issues of law. See generally, Dore v. Bedminster Twp. Bd. of Ed., supra (185 N.J. Super. at 452), but may review factual determinations of the ALJ to determine whether the decision was based on a preponderance of the credible evidence. Cf., In re Polk License Revocation, 90 N.J. 550, 560 (1982); Dore v. Bedminster Twp. Bd. of Ed., supra (185 N.J. Super. at 452). In doing so the Director may make his own independent findings of fact, nevertheless giving due consideration to the opportunity of the fact-finder to observe the parties and their witnesses. See Quinlan v. Bd. of

Ed. of North Bergen Twp., 73 N.J. Super. 40, 50-51 (App. Div. 1962).

After the Director decided the funds were "available" to E.B., she concluded, in light of the alleged power of attorney held by R.A., which was subject to agency and fiduciary principles, that:

> ...the refusal [of R.A. to liquidate the mortgage] must be considered and treated as the act and declaration of [R.A.'s] Principal [E.B.]. As a matter of settled law governing the relationship of principle [sic] and agent, the funds are "available" to [E.B.], and her agent's refusal to liquidate is legally the act of [E.B.].

Based on this reasoning, the Director held that E.B.'s benefits were properly terminated. We find no basis to disturb this ruling. E.B.'s argument that the mortgage is excludable as an "inaccessible resource" under N.J.A.C. 10:94-4.4(b)(6) is without merit. The record supports the Director's conclusion that E.B. would be

entitled to require her daughter to liquidate the mortgage on agency or fiduciary principles or to compel such action is a court proceeding.

The ALJ found that the conveyance of the former residence of E.B. and R.B. was made "on behalf of her mother and father" and that the proceeds of sale are represented by the mortgage document. The Director was not obligated to accept the statement of R.A. that she "owned" the mortgage absolutely. Indeed, the record supports the inference[8] that R.A. acted as either an agent or as a fiduciary with respect to the interests of her parents. This is notwithstanding R.A. taking the mortgage solely in her own name, particularly considering her explanation of the $200 a month payments before the regular monthly payments were to commence on April

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8 The absence of a written power of attorney by E.B. may even raise title questions.

1, 1986 as not being interest payments, principal payments or rent. These payments were apparently to be turned over to the nursing home where E.B. was confined.

We have studied the entire record in light of the arguments presented and are satisfied that the determination of the Director is not arbitrary, capricious or unreasonable and does not lack full support in the evidence. See Henry v. Rahway State Prison, 81 N.J. 571, 579-580 (1980); Campbell v. Dept. of Civil Service, 39 N.J. 556, 562 (1963).

The record supports the findings and conclusion by the Director, notwithstanding the testimony of R.A. that the property had been given to her by her father. No deed was ever executed to R.A. by her parents, and the property was clearly owned by both parents as of the date of the contract as well as of the deed to the

Horns. Although R.A. claims that the mortgage represents her individual assets, the Medicaid application completed by R.A. on behalf of her mother, identified the $200 monthly mortgage payment as her mother's income. The Director could well find, as she did, that E.B. had some form of legal or equitable interest in the mortgage. That determination is supported by sufficient credible evidence in the record. Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973). See also In re Suspension of Heller, 73 N.J. 292, 309 (1977).

Affirmed.

STATE OF NEW JERSEY

DEPARTMENT OF HUMAN SERVICES
DIVISION OF PUBLIC WELFARE

Audrey Harris
Director

Address Reply to:
CN 716
Trenton, N.J. 08625

The following Fair Hearing decision is distributed for your information. This decision has been made in consideration of the specific facts of this case. This decision is not to be interpreted as establishing any new mandatory policy or procedure not otherwise officially promulgated.

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES

FINAL DECISION

OAL DKT. NO. HPW 0987-85

AGENCY DKT NO. 11958N

Having reviewed the Initial Decision and any exceptions or replies submitted, I hereby amend the decision of the Administra-

tive Law Judge in the above captioned case.

The findings of fact by the Administrative Law Judge (ALJ) are accepted, with the exception of the finding that the respondent is currently incompetent to revoke the power of attorney given by respondent to R.B.A. This finding is rejected on the ground of lack of competent evidence in the record as to respondent's incompetency. In the absence of an adjudication by a court having jurisdiction over the matter, it must be presumed that respondent is not incompetent, and therefore has the legal capacity to revoke the power of attorney given.

I accept the finding by the ALJ that "the mortgage document (R-1) represents the proceeds from the sale of respondent's home and that the funds are not intended to purchase another home" and that the same is a non-excludable resource pursuant to

N.J.A.C. 10:94-4.1 et seq.

The conclusion by the ALJ that the aforesaid resource is not "available" within the meaning of N.J.A.C. 10:94-4.1(c), either alternately or in concert is rejected for reasons as follows:

1. Assuming the acts of R.B.A.--the refusal to liquidate the mortgage--to be within the scope of her authority as respondent's agency, the refusal, as a matter of law, must be considered and treated as the act and declaration of R.B.A.'s principal, the respondent. As a matter of the settled law governing the relationship of principle and agent, the funds are "available" to respondent, and her agent's refusal to liquidate is legally the act of respondent.

2. As a presumed mental competent, respondent has the ability to revoke the

power of attorney and assume direct personal control over the asset in question.

Based on the foregoing, the action terminating Medicaid Only eligibility is found consistent with controlling regulations and such action is affirmed.

AUDREY HARRIS, Director
New Jersey Division
of Public Welfare

April 26, 1985.

STATE OF NEW JERSEY

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. HPW 0987-85

AGENCY DKT. NO. 11958N

BURLINGTON COUNTY

WELFARE AGENCY,
Petitioner

v.

E.B.,
Respondent.

James Suszynski, Income Maintenance Supervisor, appearing pursuant to N.J.A.C. 1:1-3.12(a)3, for petitioner

Donald B. Mark, Esq., for respondent (Slater & Tenaglia, attorneys)

Record Closed: March 19, 1985

Decided : March 26, 1985

BEFORE BERNARD GOLDBERG, ALJ:

STATEMENT OF CASE AND PROCEDURAL HISTORY

Respondent appeals from an action of the Burlington County Welfare Agency (CWA) terminating Medicaid reimbursement for nursing home care because of failure to cooperate with the development of a plan for liquidation of a mortgage on her domicile held by her daughter. A hearing was requested on February 21, 1985, and the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. The hearing was conducted on March 12, 1985, at the WIN/DYFS Building in Mount Holly, New Jersey. The record was not closed until March 19, 1985, in order to permit respondent an opportunity to submit a copy of the mortgage document to the administrative law judge.

For its adverse action, petitioner relied upon N.J.A.C. 10:94-4.3(f) and N.J.A.C.

10:94-4.4. The former regulation provides for termination of benefits for failure to cooperate in a plan for resource liquidation. The latter regulation excludes the proceeds from the sale of a home only when the money is to be used to purchase another home.

FACTUAL DISCUSSION

The facts are not in dispute and the issue presented is purely one of law. Initially, it should be noted that respondent, E.B., an 83-year-old senile female, a resident of Care Inn Nursing Home in Marlton, New Jersey, did not appear at the hearing. She was represented by her daughter, R.B.A., who has her power of attorney. R.B.A. was represented by Donald B. Mark, Esq.

R.B. (now deceased) and E.B., his wife, the respondent, owned Lot 17, Block 403, in the Township of Southampton, Burlington County, as tenants by their entireties. This was the marital domicile. In

July 1976, R.B. and E.B. vacated the premises leaving the taxes in arrears and went to live with their daughter, R.B.A., because E.B. was senile and R.B. required a "walker." Shortly thereafter, R.B. became incontinent and frequently fell. R.B.A., who was fully employed, provided them with visiting nurses and Meals on Wheels.

R.B.A. brought the taxes current on the vacated premises and continued to pay them for five or six years. There was no evidence of the amounts she paid, nor did she provide any documentation for expenses she allegedly paid for nursing care or meals for her parents.

The premises were vandalized, including the stripping of copper pipes. There was also evidence that drug abusers frequented the vacant premises. R.B.A. was unable to attract purchasers for the vacant property until 1981.

On February 1, 1981, an Agreement of Sale was executed between R.B.A. and Alfred and Ruth Horn, husband and wife. In the agreement the seller is denominated as R.B. by R.B.A., his attorney-in-fact, and E.B., his wife, by R.B.A., her attorney-in-fact. At the hearing, only the power of attorney from R.B. to R.B.A. was produced (P-2). That document, a general power of attorney, includes the following language at paragraph (5):

> Have power of sale on any and all real estate of which I may now be seized or may hereafter become seized, and more particularly on land and premises known as Lot 17, Block 403, located on Route 38, in the Township of Southampton County of Burlington and State of New Jersey, and also power to mortgage any and all of such real estate for such price, and on such terms as my said attorney shall deem to be just right and proper, and, for me and in my name, to make, execute, acknowledge, and deliver goods and sufficient deeds and conveyances for the same, including mortgages, with or without covenants and/or warranties;...

The power of attorney was executed on November 1, 1981, nine months after the Agreement of Sale was executed. No settlement documents were offered in evidence. There was testimony, and the Agreement of Sale so indicates, that settlement was held on April 1, 1983. The sale price was $50,000 with $1,000 down. The balance of the purchase price was to be paid or secured as follows:

> Mortgage Note as Follows: interest does not accrue on the borrowed amount, except that the Borrower shall pay $200.00 per month starting April 1, 1983 and ending March 1, 1986. The payments of $200.00 per month will not be credited against principal. Regular monthly payments of $550.55 will be due beginning April 1, 1986. Mortgage Note will be payable to R.B.A., attorney-in-fact.

R.B.A. testified that the mortgage document described her as the payee and that it does not describe her as the attorney-in-fact. The hearing was continued in order to provide her with an opportunity

to enter the mortgage documents into evidence (R-1).

On July 16, 1984, R.B.A. admitted both her mother and father to Care Inn Nursing Home, Marlton, New Jersey, on a private pay basis. Prior thereto, purportedly on June 13, 1984, R.B.A. completed an application for Medicaid on behalf of her mother and father on Form PA-1G (P-1, p.7). The application was also signed by respondent, purportedly, on June 18, 1984. Despite the fact that there was testimony that R.B. died on August 3, 1984, he is referred to on page five of that document as "deceased." No explanation was offered for his inconsistency.

On July 16, 1984, R.B.A. telephoned the Burlington CWA to advise the agency that she had admitted her parents to the nursing home. She was advised that the proceeds of the sale of the premises would be counted as income for her parents. She

said she would consult a lawyer and wished to pursue Medicaid Only for her parents.

On August 24, 1984, William J. Begley, Esq., who prepared the power of attorney and at whose offices final settlement on the premises was held, wrote to the CWA at Mount Holly as follows:

> Dear Mr. Rulli:
>
> Mrs. [R.B.A.] has asked that I write to you in support of her application for medicaid assistance on behalf of her parents, Mr. and Mrs. [R.B.].
>
> The [B.'s] held legal title to certain real property located on Route 38 in Southampton Township, Burlington County from 1956 and 1958 until April 1, 1983, when it was conveyed to [A. and R.H.].
>
> During 1976, the [B.'s] began to rely upon their daughter and son-in-law for care, and in July of that year they left their home and moved in with the daughter and her family. At that time, they gave their house and property on Route 38 to [R.B.A.], although no deed was signed.
>
> Mrs. [R.B.A.] attempted to sell the property over a period

of several years, and she finally sold it to Mr. and Mrs. Horn. They reached an oral agreement in 1981 and title passed in April, 1983. The transaction has been structured as an installment sale, and as of this point, no consideration has passed except for the payment of some interest. Pursuant to the terms of the mortgage, Mrs. [R.B.A.] won't receive any income from the sale until April, 1986.

It is now necessary that the [B.'s] receive the full time attention available only through an in-patient nursing facility. I sincerely hope that the conveyance of their former home to their only heir won't be set aside in the pursuit of suitable care for the parents.

Very truly yours,
[s]
WILLIAM J. BEGLEY

WJB:m
cc: [R.B.A.]

[P-1,p.9]

On October 5, 1984, the CWA advised R.B.A. by letter that the mortgage note was considered a resource belonging to E.B. and demanded its liquidation within six months pursuant to N.J.A.C. 10:94-4.3(b).

CWA policy permits three denial letters from financial institutions to serve as evidence of good cause for failure to liquidate. She was so advised. Since that time no denial letters were received and R.B.A. notified the CWA orally that she would not comply with the liquidation request since the proceeds of the mortgage belonged to her and not to her mother. The testimony revealed, however, that under the Agreement for the period April 1, 1983 to March 1, 1986, she has been paying the $200 payable to the CWA upon receipt, but under protest.

Based upon these representations, the CWA terminated Medicaid effective February 28, 1985, on the theory that R.B.A. failed to cooperate, N.J.A.C. 10:94-4.3(f).

R.B.A. does not characterize the $200 payments as interest because of the recitation in the Agreement of Sale that they are not so denominated and apparently

the CWA acquiesced in this novel interpretation because it sought liquidation only of the payments commencing April 1, 1986 (See, letter from CWA to R.B.A.; P-1, p.16).

R.B.A. considers the mortgage to be her retirement fund.

The mortgage note (R-1) was received on March 19, 1985, and reveals, in pertinent part without any words of limitation whatsoever, that the lender is identified as R.B.A.

Based upon the foregoing, I FIND that:

1. E.B. and R.B. were the owners of record of Block 403, Lot 17.

2. Lot 17, Block 403, was the marital premises of E.B. and R.B.

3. R.B. executed a power of attorney on February 1, 1981, in favor of R.B.A. with the power to convey Lot 17, Block 403.

4. R.B.A. had power of attorney for her mother, E.B.

5. On behalf of her mother and father R.B.A. conveyed Lot 17, Block 403, on April 1, 1983, to Mr. and Mrs. Horn pursuant to her power of attorney.

6. The proceeds of the sale of Lot 17, Block 403, are represented by the mortgage document (R-1).

7. The proceeds of the sale of Lot 17, Block 403, are not intended to be used to purchase a home for E.B.

8. Respondent has never revoked the power of attorney given to R.B.A. and is currently incompetent to do so.

9. R.B., husband of respondent, is deceased.

10. The mortgage document does not identify R.B.A. as attorney-in-fact for either E.B. or R.B.

11. R.B.A. refuses to liquidate the mortgage.

LEGAL DISCUSSIONS

This is an unfortunate case. R.B.A. and her attorney did not represent the interest of E.B., the respondent, but the interest of R.B.A., who sought to protect what she perceives to be her "retirement fund." They seek a determination that R.B.A. holds both the legal and equitable interest in the mortgage (R-1). That issue properly belongs in the superior court. N.J. Const. (1947), Art. VI, 3, par. 3, R. 4:3-1.

The CWA, on the other hand, seeks a determination that the mortgage instrument is a resource available to the respondent, N.J.A.C., 10:94-4.1(b) and (c)1, and is not excludable under N.J.A.C. 10:94-4.4(b) 8ii because the proceeds are not intended to purchase a home for E.B.

The CWA's position implies that the words of the mortgage are either inartfully drawn or fraudulent. This is the other

side of the law and equity issue raised by R.B.A.

It is not necessary to reach that issue since the plain language of the code controls. Furthermore, since no order of this tribunal could conceivably affect the ownership of the mortgage, it would be fruitless to speculate as to whether or not a resulting trust was or was not created in this instance.

I have found that the mortgage document (R-1) represents the proceeds from the sale of respondent's home and that the funds are not intended to purchase another home. N.J.A.C. 10:94-4(b)8ii. Therefore, they are not an excludable resource and must be used to establish respondent's Medicaid eligibility.

A more difficult question arises under N.J.A.C. 10:94-4.1(c):

> (c) Availability of resources; In order to be considered in the determination of

> eligibility, a resource must be "available." A resource shall be considered available to an individual when:
>
> 1. The individual has the right, authority, or power to liquidate real or personal property, or his/her share of it....

Does respondent have the right "authority" or "power" to liquidate this mortgage? Clearly, R.B.A. has this power but will not liquidate the mortgage. No power of this tribunal can coerce her to do so. To hold that respondent has such a "right," "authority" or "power" to liquidate as a result of the power she delegated to R.B.A. is to rely on a legal fiction which is more form than substance under the facts of this case.

CONCLUSIONS OF LAW

I reluctantly CONCLUDE that this resource is not available to respondent be-

cause of R.B.A.'s refusal to exercise the power of attorney, which is still valid.

A contrary determination would leave respondent without a remedy. Petitioner, however, does have a remedy. As the provider of Medicaid, it has the requisite standing to seek the appointment of a guardian ad litem for respondent. In re Bennett, 180 N.J. Super. 106 (Law Div. 1981). Thereafter, the equitable and legal issues raised at the administrative law hearing can be resolved in a court of competent jurisdiction.

I, therefore, CONCLUDE that the action of the Burlington County Welfare Agency terminating respondent's Medicaid benefits was erroneous and I ORDER that it be REVERSED.

This recommended decision may be affirmed, modified or rejected by the DIRECTOR OF THE DIVISION OF PUBLIC WELFARE, AUDREY M. HARRIS, the designee of the Commissioner of the Department of Human Services, George

J. Albanese, who by law is empowered to make a final decision in this matter. However, if Audrey M. Harris does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby FILE my Initial Decision with AUDREY M. HARRIS for consideration.

March 26, 1985. s/BERNARD GOLDBERG, ALJ

Receipt Acknowledged:

March 27, 1985. s/AUDREY M. HARRIS
Division of Public Welfare

Mailed To Parties:

March 29, 1985. s/RONALD I.
Office of Administrative Law

bc

EXHIBITS

For the Petitioner:

P-1 CWA records

P-2 Power of Attorney given by R.B. to R.B.A., his daughter, November 1, 1981

For the Respondent:

R-1 Mortgage, dated April 1, 1983, between Mr. and Mrs. Alfred J. Horn, the borrowers and R.A., the lender

WITNESSES

For the Respondent:

R.B.A., daughter of respondent

Alfred J. Horn, mortgagor

(2)

Supreme Court, U.S.
FILED
MAY 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1680

In The
Supreme Court of the United States
October Term, 1985

E.B.,

Petitioner,

v.

BURLINGTON COUNTY WELFARE AGENCY,
and THE DIRECTOR,
DIVISION OF PUBLIC WELFARE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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COUNTERSTATEMENT OF THE CASE

Petitioner seeks review, by writ of *certiorari,* of a decision of the Appellate Division of the Superior Court of New Jersey that determined a mortgage taken in the name of E.B.'s daughter was an available resource which precluded payment of medicaid benefits to E.B. The Supreme Court of New Jersey declined to grant a petition for certification from the decision of the Appellate Division.

The sole issue presented to the Appellate Division was whether a mortgage representing the proceeds of a sale of E.B.'s family home is a resource available to E.B. even though her daughter, Mrs. Ash, placed the mortgage in her own name without reference to her alleged status as attorney in fact. No constitutional issue was raised to the Appellate Division. Counsel for respondent argued in opposition to the subsequent Petition for Certification that any constitutional issue had been waived by E.B.'s failure to raise the issue below.

Facts pertinent to the legal issues were adduced at a fair hearing. E.B. and her husband owned and lived in a house in Mount Holly, New Jersey, until July 1976 when they went to live with their daughter, Ruth Ash. In February 1981, E.B.'s husband executed a general power of attorney to his daughter, Ruth Ash. E.B. did not execute a power of attorney, although Mrs. Ash testified at the fair hearing that one existed.

In 1981 Mrs. Ash signed an agreement for the sale of the parents' home to an unrelated third party. The agreement stated Mrs. Ash acted as attorney in fact for E.B. and her husband.

Title was transferred in 1983 and the deed recites that Mrs. Ash acted as attorney in fact. When the title was transferred, Mrs. Ash received a mortgage from the purchasers for $50,000. The mortgage does not recite that Mrs. Ash acted as attorney-in-fact for her parents, but lists Mrs. Ash as the mortgagee.

On June 13, 1984 Ms. Ruth Ash applied for medicaid only benefits for E.B. and her father. The application form listed interest income to E.B. of $200 per month from this mortgage. The welfare agency extended medicaid benefits, but pursued investigation of this mortgage as a possible resource subject to liquidation. On July 16, 1984 E.B. and her husband were placed in a nursing home and the welfare agency was so notified. The Agency notified Mrs. Ash by telephone that the proceeds from the sale of the family home would be counted as a resource. E.B.'s husband died shortly after entering the nursing home.

On October 5, 1984 a county welfare worker advised Ms. Ash that regulations governing medicaid only eligibility required liquidation of the mortgage note. On February 14, 1985 the agency notified E.B. that the medicaid benefit would terminate on February 28, 1985 due to her failure to cooperate in liquidating the mortgage.

On March 12, 1985 a fair hearing was held. E.B. did not appear at the hearing, but her daughter appeared and represented to the court that she had a power of attorney for her mother. The daughter also characterized her mother as senile. Counsel for the petitioner, E.B., appeared with Mrs. Ash at the hearing, and subsequently confessed to the Appellate Division of the State Court that he represented both Mrs. Ash and E.B.

From testimony at the hearing, the ALJ found that Ms. Ash conveyed E.B.'s home on April 1, 1983, that the mortgage in Mrs. Ash's name represented the proceeds of the sale of E.B.'s home, that Ms. Ash had been given a power of attorney by E.B. and that Ms. Ash refused to liquidate the mortgage. Although finding that the mortgage represented assets of the parents, the Judge also found that the mortgage document did not recite that Mrs. Ash acted as an attorney-in-fact. The ALJ concluded that the mortgage was a resource not available to Mrs. Boyd since her daughter refused to liquidate. In discussing his finding the judge determined that he was powerless to affect the ownership of the mortgage and reluctantly concluded that the mortgage was not a resource available to Mrs. Boyd.

On April 26, 1985, the Director of the Division of Public Welfare rejected the initial decision finding that the mortgage represented an available resource. The Director reasoned that Mrs. Ash acted as an agent for her mother and therefore her acts are attributable to the mother. In addition, the Director rejected the finding that E.B. was incompetent since the record was devoid of any evidence to that effect.

In a written opinion filed October 9, 1985, the Appellate Division affirmed the decision of the Director. The court held that sufficient credible evidence supported the Director's determination that E.B. owned the mortgage and that the resource was available based upon the agency relationship.

Counsel for E.B. then filed a petition for certification to the Supreme Court of New Jersey arguing that

the Director's decision violated equal protection of the laws. Counsel for respondents argued that this issue had not been raised to the appellate court and that failure required a dismissal of the petition. The Supreme Court denied the petition without comment.

ARGUMENT

A. THIS PETITION IS WITHOUT MERIT FOR THE COURTS BELOW CORRECTLY DETERMINED THAT THE MORTGAGE IS E.B.'S ASSET AND THIS DETERMINATION IS CONSISTENT WITH 42 U.S.C. § 1396(a)(17).

The State of New Jersey has elected to participate in the Medicaid programs established as Title XIX of the Social Security Act, 42 *U.S.C.* § 1396 *et seq.* Pursuant to the State's election and the plan submitted to the Department of Health & Human Services, medically needy persons apply for benefits through county welfare agencies (hereinafter CWA). The CWA makes an initial determination of eligibility which the client may contest by requesting a fair hearing. *N.J.A.C.* 10:94-8.4. The final decision on any issue is made by the Director of the single state agency charged with supervision of the program. *Id.*

Eligibility for medicaid clearly depends upon the income and resources of the applicant. *See* 42 *U.S.C.* § 1396a (a)(17)(B); *Hedgebeth v. Medford*, 74 *N.J.* 360, 364 (1977). Standards of eligibility are prescribed by the Secretary of the Department of Health and Human Services. The controlling federal regulation states in part:

> To determine eligibility on the basis of resources for medically needy individuals, the Agency must (a) consider only the individual's resources and those that are considered available to him under the financial responsibility requirements for relatives under § 436.82. [45 *C.F.R.* § 436.845].

In New Jersey, applicants for medicaid may hold resources valued at $1,600 for an individual. *N.J.A.C.* 10:94-4.5(c). This resource limit applies to individuals in long-term care facilities. *N.J.A.C.* 10:94-4.5(d). Resources exceeding the limit must be liquidated and the proceeds applied to support the applicant. *N.J.A.C.* 10:94-4.3. The instant case arose within this context. Petitioner, upon applying for benefits, was called upon to liquidate a mortgage with a value in excess of $1500, to retain qualification for assistance. Based upon evidence adduced at a fair hearing and in accordance with New Jersey's concepts of title, the Director of the Division determined that E.B. owned the mortgage despite the daughter's attempt to subvert the proceeds to her own purposes.

Petitioner's characterization of the issue for review by this Court seriously distorts the factual picture available to the Director and the courts below. The daughter who has supposedly absconded with the mortgage, made the application for E.B.'s medicaid benefits and listed the mortgage income as E.B.'s asset. The daughter was noticed of the fair hearing questioning the liquidation requirement and appeared without her mother. The attorney who presents this petition, accompanied the daughter to the hearing. At the hearing the daughter testified she sold her parents' house based upon a power of attorney from the mother and father. The daughter also contended

she was the true owner of the property because her father had said he wanted her to have it. Based upon the daughter's testimony and the documents in evidence, the Director determined that the daughter acted as a fiduciary for the mother, E.B., and that the daughter held the mortgage in trust. The Appellate Division affirmed.

Thus petitioner's argument that the State courts relied upon form over substance is correct, but meaningless. Under tenets of property law and agency E.B. owns the mortgage at issue. This court, in a different factual context, has approved the concept of "deeming" of resources between spouses noting that in eligibility determinations "available [resources] are different than from those in hand." *Schweiker v. Gray Panthers*, 453 *U.S.* 34, 48 (1981). Thus, within limits, the concept of availability of resources is one of form over substance.

But the substance of this case also belies petitioner's arguments. In this case the daughter has consistently acted on behalf of her mother: first, in applying for benefits; second, in placing the mother in a nursing home; third, in appearing for her mother at the fair hearing; fourth, in obtaining counsel. The representation to this Court, that the daughter has stolen the mortgage, does not even accord with the daughter's conduct.

Petitioner concludes that the determination of eligibility in medicaid cases affects a significant proportion of the population. Even so, the determination at issue here raises no substantial federal question. Each eligibility determination is inextricably tied to the questions of an individual's resources, how and with whom they are owned. Nothing in the facts adduced below merits

consideration in this court of the eligibility procedure or the Director's decision.

B. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED SINCE PETITIONER FAILED TO RAISE ANY CONSTITUTIONAL ISSUE TO THE STATE'S APPELLATE DIVISION THEREBY WAIVING THE RIGHT TO REVIEW.

This Court's jurisdiction to review this case arises under 28 *U.S.C.* § 1257(3) which concerns federal rights and privileges that have been specially set up or claimed and upon which there has been a final decision of the state's highest court. *Cardinale v. Louisiana,* 394 *U.S.* 437, 439 (1969). The constitutional question presented by petitioner was not raised before the Appellate Division of the Superior Court of New Jersey and is thus not a proper issue before this court.

Petitioner first sought to raise this issue in a petition for certification to the Supreme Court of New Jersey and respondents objected. Issues not raised in the lower courts of New Jersey are generally not considered on appeal unless the newly stated issue involves the court's jurisdiction or a matter of great public interest. *Deerfield Estates, Inc. v. Tp. of East Brunswick,* 60 *N.J.* 115, 120 (1972). *Ferraro v. Demetrakis,* 167 *N.J. Super.* 429, 431 (App. Div. 1979) *certif.* denied 81 *N.J.* 290 (1979).

Notwithstanding this procedural consideration, petitioner's statement of an equal protection issue is patently without merit. No arbitrary classification has been imposed upon this applicant for medicaid assistance. As any other applicant, her resources and income must be examined to determine eligibility. E.B. by virtue of her ownership of the mortgage becomes ineligible for medi-

caid because she is less indigent than regulations permit. This Court has recognized that welfare programs involve limited resources necessitating eligibility determinations and classifications. See generally *Schweiker v. Gray Panthers, supra* at 48; *Dandridge v. Williams,* 397 *U.S.* 471, 485 (1970). Eligibility criteria are the basic factors in distributing limited resources to the needy and create the most rational classification: needy v. less needy.

This petition for a writ of *certiorari* thus does not raise a question of constitutional dimension which warrants this court's review. The petition should be denied.

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CONCLUSION

For the above stated reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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